Section 2: Justice Sotomayor The Supreme Court

Institute of Bill of Rights Law at The College of William & Mary School of Law

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II. JUSTICE SOTOMAYOR THE SUPREME COURT

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President Obama will nominate Judge Sonia Sotomayor of the United States Court of Appeals for the Second Circuit as his first appointment to the court, officials said Tuesday, and has scheduled an announcement for 10:15 a.m. at the White House.

If confirmed by the Democratic-controlled Senate, Judge Sotomayor, 54, would replace Justice David H. Souter to become the second woman on the court and only the third female justice in the history of the Supreme Court. She also would be the first Hispanic justice to serve on the Supreme Court.

Conservative groups reacted with sharp criticism on Tuesday morning.

"Judge Sotomayor is a liberal judicial activist of the first order who thinks her own personal political agenda is more important than the law as written," said Wendy E. Long, counsel to the Judicial Confirmation Network. "She thinks that judges should dictate policy, and that one's sex, race, and ethnicity ought to affect the decisions one renders from the bench."

The president reached his decision over the long Memorial Day weekend, aides said, but it was not disclosed until Tuesday morning when he informed his advisers of his choice less than three hours before the announcement was scheduled to take place.

Mr. Obama telephoned Judge Sotomayor at 9 p.m. on Monday, officials said, advising her that she was his choice to fill the Supreme Court vacancy. Later Monday night, Mr. Obama called the three other finalists—Judge Diane P Wood of Chicago, Homeland Security Secretary Janet Napolitano and Solicitor General Elena Kagan—to inform them that he had selected Judge Sotomayor.

White House officials worked into the night to prepare for the announcement, without knowing who it would be.

Judge Sotomayor has sat for the last 11 years on the federal appeals bench in Manhattan. As the top federal appeals court in the nation's commercial center, the court is known in particular for its expertise in corporate and securities law. For six years before that, she was a federal district judge in New York.

In what may be her best-known ruling, Judge Sotomayor issued an injunction against major league baseball owners in April 1995, effectively ending a baseball strike of nearly eight months, the longest work stoppage in professional sports history, which had led to the cancellation of the World Series for the first time in 90 years.

Born in the Bronx on June 23, 1954, she was diagnosed with diabetes at the age of 8. Her father, a factory worker, died a year later. Her mother, a nurse at a methadone clinic, raised her daughter and a younger son on a modest salary.

Judge Sotomayor graduated from Princeton University summa cum laude in 1976 and attended Yale Law School, where she was
an editor of the Yale Law Journal. She spent five years as a prosecutor with the Manhattan district attorney’s office before entering private practice.

But she longed to return to public service, she said, inspired by the “Perry Mason” series she watched as a child. In 1992, Senator Daniel Patrick Moynihan recommended the politically centrist lawyer to President George H. W. Bush, making good on a longstanding promise to appoint a Hispanic judge in New York.

On the Circuit Court, she has been involved in few controversial issues like abortion. Some of her most notable decisions came in child custody and complex business cases. Her most high-profile case involved New Haven’s decision to toss out tests used to evaluate candidates for promotion in the fire department because there were no minority candidates at the top of the list.

She was part of a panel that rejected the challenge brought by white firefighters who scored high but were denied promotion. Frank Ricci, the lead plaintiff, argued that it was unfair he was denied promotion after he had studied intensively for the exam and even paid for special coaching to overcome his dyslexia. The case produced a heated split in the Circuit Court and is now before the Supreme Court.
As Supreme Court nominee Sonia Sotomayor stood next to President Obama on Tuesday, she admitted to being a bit nervous and “deeply moved.”

And then the Puerto Rican child of the housing projects in the Bronx, N.Y., made it clear who she believed was mostly responsible for her being in position to become the first Hispanic on the Supreme Court: her mother.

“I have often said that I am all I am because of her, and I am only half the woman she is,” Sotomayor said of Celina Sotomayor, who worked as a nurse six days a week to support her family.

Obama’s selection of Sonia Sotomayor, 54, drew an emotional wave of praise from Hispanic groups. Sotomayor’s story—a minority rising from humble beginnings to, potentially, the top rungs of American government—rivals that of Obama himself, and suggests a steeliness that could be helpful in a Senate confirmation process that can be intimidating.

In nominating Sotomayor, Obama talked as much about her success story—from New York’s projects to Princeton, Yale Law School and appointments to federal judgeships—as he did about Sotomayor’s views on the law.

“She’s faced down barriers, overcome the odds, lived out the American dream that brought her parents here so long ago,” Obama said, noting that Sotomayor’s father was a factory worker with a third-grade education who didn’t speak English. He died when she was 9.

If approved by the Senate, Sotomayor would be the third woman ever to join the high court and the second on the current bench, joining Ruth Bader Ginsburg. In announcing his choice as a successor to retiring Justice David Souter and the first high-court nomination of his tenure, Obama called Sotomayor an “inspiring woman who I believe will make a great justice.”

As a successor to the liberal Souter on the divided, nine-member court, Sotomayor is not likely to tip the ideological balance of the bench. Yet she would bring diversity to the court—whose members include eight whites and one African American (conservative Clarence Thomas)—not only in her ethnicity, but in how she arrived at the high court.

Sotomayor won a scholarship to Princeton, then attended Yale Law School. She became a prosecutor in New York, then a corporate litigator, before being seated to a federal trial court by the first President Bush. Six years later, President Clinton elevated her to a New York-based appeals court.

On Tuesday, Sotomayor presented herself much in the vein of the president, as someone who beat the odds of economics, race and ethnicity in childhood.

“My heart today is bursting with gratitude,” she said.

Lisa Zornberg, a former law clerk to
Sotomayor, said “the way she presented herself is entirely true to how she is as a person. She is 100% authentic. She is a dynamo. She is incredibly charming and very much about real-world pragmatism.”

Democrats, including Senate Judiciary Chairman Patrick Leahy, D-Vt., praised her “exemplary record” and said he would work closely with Republicans to win confirmation.

Republican senators, including Minority Leader Mitch McConnell of Kentucky, said they would need time to review Sotomayor’s 17-year record as a judge.

“We will thoroughly examine her record to ensure she understands that the role of a jurist in our democracy is to apply the law evenhandedly, despite their own feelings or personal or political preferences,” McConnell said.

Conservative interest groups, including the American Center for Law and Justice (AC LJ), called her an “activist” judge. Among her more controversial votes as a judge was one endorsing a Connecticut city’s decision to discard the results of a firefighter promotion test because blacks and Hispanics scored disproportionately lower than whites. The case is now before the Supreme Court.

Sotomayor was typically direct Tuesday in signaling that she would not be shy about countering such criticism. She said she decides cases based on the law, without an agenda in mind.

“I firmly believe in the rule of law,” she said.

The president said that of four finalists he interviewed for the appointment, he knew the least about Sotomayor and had never met with her before Thursday, when she spent seven hours at the White House, including one with the president.

‘Really an inspiration’

The news of Sotomayor’s nomination was announced over the public-address system at her old school, Cardinal Spellman High School in the Bronx.

And it echoed around the brick buildings of the Bronxdale Houses, the public housing complex where Sotomayor grew up.

“It’s really an inspiration for me,” says Ivellisse Velasquez, 18, who has always lived in Bronxdale Houses. “I can really be whatever I want to be. She made it out of the projects and hardly anyone makes it out.”

Sotomayor’s parents came to New York from Puerto Rico during World War II. After her husband died, Sotomayor’s mother worked two jobs, including one as a nurse at a methadone clinic, to support Sonia and her brother, Juan, who is now a doctor.

At age 8, Sotomayor was diagnosed with Type 1 diabetes, for which she continues to take insulin daily. She has said she initially wanted to become the next Nancy Drew (a fictional detective), but turned to another role model: the judge on the TV courtroom drama “Perry Mason.”

Her mother bought a set of encyclopedias on an installment plan. The encyclopedias helped Sotomayor get first to Cardinal Spellman, where she participated in student government and on the debate team, and then, after her graduation in 1972, to Princeton.

There, she was not only one of a few
Hispanic students but also in one of the first classes of women to enter the Ivy League school. She felt so out of her element, she has said in interviews, that she didn’t raise her hand once in class during her freshman year.

By the time she graduated in 1976, she had received the school’s highest prize for scholarship, character and leadership. In 2001, the university awarded her an honorary doctorate, and in 2007 she became a trustee.

“She was a big name on campus, she won the Pyne Prize, which is sort of like the MVP of the student body,” says Randall Kennedy, a Harvard Law School professor who was a year behind Sotomayor at Princeton. “She really distinguished herself . . . and was headed for big things.”

Not since the 1991 nomination of Clarence Thomas, who was born in poverty near Savannah, Ga., and reared by grandparents, has a Supreme Court nominee overcome such personal odds.

If confirmed, Sotomayor likely would be the least wealthy justice, judges’ financial disclosures show. While most Supreme Court justices are millionaires, the only assets Sotomayor reported on her 2007 disclosure form were a savings account containing $50,000 to $100,000 and a checking account with less than $15,000. She earned $179,500 in 2008 as a judge on the 2nd U.S. Circuit Court of Appeals in New York. As a justice, she would make $208,100.

A ‘radical’ choice?

The appeals court decision allowing the city of New Haven to toss the results of a firefighter promotion test provided material for Sotomayor’s critics.

The city threw out the test results because blacks and Hispanics scored disproportionately lower than whites.

The Supreme Court is weighing whether the “reverse discrimination” move violated the rights of white firefighters who say they were denied promotions.

The tone of oral arguments last month suggested the justices were ready to reverse the appeals court.

Noting that Sotomayor had voted to throw out the firefighters’ test, Roger Pilon, vice president of legal affairs of the libertarian Cato Institute, said Obama had chosen “the most radical of all the frequently mentioned candidates before him.”

Yet, much of Sotomayor’s work as a trial judge and then appellate jurist has involved routine business and other civil matters, rather than incendiary social topics such as abortion and the death penalty.

As a trial judge, she also issued an order that helped end the Major League Baseball strike of 1994-95.

“Some say that Judge Sotomayor saved baseball,” Obama said Tuesday.

She was an assistant district attorney in New York 1979-84, then worked at the law firm of Pavia and Harcourt 1984-1992.

Manhattan district attorney Robert Morgenthau described Sotomayor as someone who would decide cases “down the middle.”

“She’s highly intelligent, (a) very hard worker and she’ll do what she thinks is right
based on the law and not on any ideology," Morgenthau said.

Sotomayor’s remarks at a 2005 legal conference at Duke University’s law school are likely to draw scrutiny during the confirmation process, especially among conservatives who question whether she would interpret the Constitution strictly or try to change policies through rulings.

“The court of appeals is where policy is made,” Sotomayor said during the conference.

She then quickly added, “I know this is on tape and I should never say that, because we don’t make law, I know. Um, OK. I know. I’m not promoting it, I’m not advocating it.”

White House spokesman Robert Gibbs said Sotomayor’s career proves “this is not somebody that you could reasonably argue advocates for or is engaged in legislating from the bench.”

In 2002, Sotomayor wrote the 2nd Circuit’s opinion rejecting a challenge to Bush administration policy barring federal funding for foreign nongovernmental organizations that perform abortions, the so-called “Mexico City Policy.”

“The Supreme Court has made clear that the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds,” she wrote in the decision against abortion-rights groups.

Yet she has authored opinions that could be deemed liberal and that have been reversed by the conservative majority at the Supreme Court.

Among those was her 2000 opinion allowing a prisoner who suffered a heart attack while in a halfway house to bring a constitutional claim against a private corporation that ran the house on behalf of the Bureau of Prisons.

Thomas Goldstein, a Washington appellate lawyer who has worked closely with Democrats yet independently reviewed her opinions, said, “Our surveys of her opinions put her in essentially the same ideological position as Justice Souter.”

Jay Sekulow, chief counsel for the conservative ACLJ, however, said Sotomayor represents “an aggressive decision the president has made that’s going to trigger a national debate on the issue of judicial activism and the role of the judiciary.”
“Sotomayor's Record Sets off Few Ideological Alarm Bells”

*The Los Angeles Times*
May 27, 2009
David G. Savage and Christie Parsons

In nominating Sonia Sotomayor to the Supreme Court on Tuesday, President Obama tapped a veteran jurist whose humble upbringing and moderate-to-liberal record is unlikely to trigger an ideological battle in the Senate. Sotomayor, 54, would be the first Latino on the court. Legal experts said that her narrowly written opinions resembled those of the justice she would replace, David H. Souter. She has not ruled squarely on controversial issues such as gay rights or abortion.

Standing with Sotomayor by his side in the East Room of the White House, Obama said, “I have decided to nominate an inspiring woman who I believe will make a great justice.”

The president said he had considered many factors in his selection: “First and foremost is a rigorous intellect. . . Second is a recognition of the limits of the judicial role,” noting that “a judge’s job is to interpret, not make, law.” Obama also said he wanted a nominee with “a sense of compassion, an understanding of how the world works and how ordinary people live.”

Sotomayor, who was raised in a Bronx housing project, spoke of the inspiration that her family and the law had provided.

“For as long as I can remember,” she said, “I have been inspired by the achievement of our Founding Fathers. They set forth principles that have endured for more than two centuries. . . . It would be a profound privilege for me to play a role in applying those principles to the . . . controversies we face today.”

In a statement after the nomination was announced, the abortion-rights group NARAL Pro-Choice America said: “We look forward to learning more about Judge Sotomayor’s views on the right to privacy and the landmark *Roe vs. Wade* decision as the Senate’s hearing process moves forward.”

One of Sotomayor’s colleagues on the U.S. 2nd Circuit Court of Appeals in New York said he was surprised that some conservative groups had called Sotomayor a liberal or an activist judge.

“We have some judges on the left end of the spectrum. Sonia’s well in the middle,” said Judge Guido Calabresi, a former Yale Law School dean. “That’s one of the things I have been pointing out to people. . . . Activism has a meaning—judges who reach out to decide things that aren’t before them. Sonia simply doesn’t do that.”

“She is a moderate liberal who often rules in favor of corporations and against civil rights plaintiffs,” said Kevin Russell, a Washington lawyer who has studied her writings in recent weeks.

Though Sotomayor has avoided strong rhetoric in her rulings, she has made several controversial statements. In 2001, she said her Puerto Rican heritage could cause her to see cases differently. “Whether born from experience or inherent physiological or cultural differences . . . our gender and national origins may and will make a
difference in our judging. . ." she said. "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life."

But she did not cite examples during the speech at UC Berkeley and said at one point that she vigilantly checked her “assumptions, presumptions and perspectives” about other people.

She also spoke at a Duke University School of Law forum about how the appeals courts made policy. She quickly added that she did not mean the judges made law, but instead that they set the law for their regional circuits.

Her most controversial decision appears to be a two-paragraph, unsigned opinion last year in a racial-bias case.

A three-judge panel that included Sotomayor upheld a lower-court order that tossed out a lawsuit by white firefighters in New Haven, Conn., who had good scores on tests used for promotions. The firefighters sued the City Council after it dropped the test upon learning that no blacks had qualified for promotions.

“We are not unsympathetic to the [white firefighters’] expression of frustration,” the appeals court said. But the city, “in refusing to validate the exams, was simply trying to fulfill its obligations under the [Civil Rights Act] when confronted with test results that had a disproportionate racial impact.”

Dissenting judges on the full appeals court accused Sotomayor and her colleagues of ignoring the real issue. They said the white firefighters were denied promotions because of their race, a clear violation of civil rights laws.

The Supreme Court agreed in January to hear the white firefighters’ appeal. If the justices overrule Sotomayor’s decision, it will be an embarrassment for her before her confirmation hearing. But White House lawyers said it would be hard for her critics to make a major controversy out of an unsigned two-paragraph opinion.

Sotomayor has been overturned by Supreme Court conservatives in several other cases, including an environmental decision handed down by the high court in April.

Disagreeing with the Bush administration, Sotomayor said the law did not permit officials to consider “cost-benefit analysis” when deciding how to protect river fish from power generators. The law itself spoke of using the “best technology” to protect the environment. But the high court disagreed with her in a 6-3 opinion by Justice Antonin Scalia. In another case three years ago, Sotomayor won the favor of campaign funding reformers by upholding a Vermont law that would have strictly limited spending and contributions in state races. The Supreme Court disagreed by a 6-3 vote and said the strict limits violated candidates’ free-speech rights.

In both cases, Souter took the same view as Sotomayor.

At times, Sotomayor’s rulings have won approval from conservatives on the high court.

Ten years ago, she wrote an opinion holding that drug evidence could be used against a man who was stopped based on a warrant that should have been removed from a police computer. Earlier this year, the Supreme Court adopted the same view in a 5-4 decision written by Chief Justice John G. Roberts Jr.
And in a case that may have demonstrated to Obama some of the capacity for empathy he said he wanted in a judge, Sotomayor dissented Friday when the 2nd Circuit Court threw out a suit brought by county jail inmates who were strip-searched after being arrested on misdemeanor charges.

She called the searches needlessly humiliating and unconstitutional.

White House spokesman Robert Gibbs said the president hoped that Sotomayor—who if she follows a moderate-to-liberal course is not likely to shift the court’s ideological balance—would be confirmed by the Senate by September.

Washington lawyer Thomas Goldstein, who appears regularly before the high court, predicted that Sotomayor would not be the outspoken liberal some on the left had hoped for.

“On the modern court, she’s on the center left, pretty much right in line with Justice Souter,” he said, based on an analysis of her opinions. “Back in the day of the Warren court, she certainly would have been regarded as a moderate.”
Supreme Court nominee Sonia Sotomayor’s opinions show support for the rights of criminal defendants and suspects, skepticism of corporations, and sympathy for plaintiffs alleging discrimination, an analysis of her record by The Washington Post found. And she has delivered those rulings with a level of detail considered unusual for an appellate judge.

During nearly 11 years on the federal appeals court in New York, Sotomayor has made herself an expert on subjects ranging from the intricacies of automobile mechanisms to the homicide risks posed by the city’s population density. Her writings have often offered a granular analysis of every piece of evidence in criminal trials, and sometimes read as if she were retrying cases from her chambers.

Legal experts said Sotomayor’s rulings fall within the mainstream of those by Democratic-appointed judges. But some were critical of her style, saying it comes close to overstepping the traditional role of appellate judges, who give considerable deference to the judges and juries that observe testimony and are considered the primary finders of fact.

“It seems an odd use of judicial time, given the very heavy caseload in the 2nd Circuit, to spend endless hours delving into the minutiae of the record,” said Arthur Hellman, a University of Pittsburgh law professor and an authority on federal courts.

Adrienne Urrutia Wisenberg, a Washington criminal appellate lawyer, said appellate judges “are not in the role of reweighing the credibility of a witness. Someone’s demeanor is not reflected on a transcript.”

But Wisenberg said she admires Sotomayor’s “tenacious trial lawyer’s personality,” and Dan Himmelfarb, a Washington lawyer and former clerk to conservative Supreme Court Justice Clarence Thomas, said Sotomayor is “extraordinarily thorough, and a judge would ordinarily be praised for writing thorough opinions.”

To examine the record of Sotomayor, whose Senate confirmation hearings begin Monday, The Post reviewed all 46 of her cases in which the 2nd Circuit issued a divided ruling, nearly 900 pages of opinions. Although Sotomayor has heard about 3,000 cases, judicial scholars say split decisions provide the most revealing window into ideology because in such cases the law and precedent are often unclear, making them similar to cases heard by the Supreme Court. President Obama, who nominated Sotomayor to replace retiring Justice David H. Souter, has said Supreme Court justices will be in agreement 95 percent of the time.

Sotomayor’s votes in split cases were compared with those of other judges through a database that tracks federal appellate decisions nationwide, a random sampling of 5,400 cases. The database codes decisions as “liberal” or “conservative” based on what its creator, University of South Carolina political scientist Donald Songer, says are common definitions. Votes in favor of a defendant, for example, are classified as
liberal, while those supporting prosecutors are called conservative.

Sotomayor’s votes came out liberal 59 percent of the time, compared with 52 percent for other judges who, like her, were appointed by Democratic presidents. Democratic appointees overall were 13 percent more liberal than Republican appointees, according to the database analysis.

Experts said the results show that Sotomayor’s ascension would probably not alter the balance of a high court closely divided between conservatives and liberals such as Souter. But they also provide a more nuanced picture of the 17-year federal judge than those offered by her supporters and her critics.

The White House has portrayed Sotomayor as a tough-on-crime moderate who favors the “judicial restraint” often sought by Republicans, while conservatives call her a liberal activist whose decisions are influenced by ideology and her Latina heritage.

“She looks like a classic Democrat,” Songer said. “I don’t think it’s fair to classify her as tough on crime. I would use the term ‘moderately liberal,’ not ‘moderate.’ But she certainly seems to be in the mainstream of Democratic judges.”

The split decisions, which are heavy on the criminal and business cases that tend to dominate the Supreme Court’s docket, show Sotomayor voting to overturn convictions or sentences eight times, at a rate comparable to that of other Democratic-appointed judges. Six times, she affirmed them.

In one case, Sotomayor and seven mostly Democratic colleagues voted to set free a convicted murderer who did not contest his guilt but had been tried on what the court called the wrong murder charge. In another, she joined an opinion that cited flawed jury instructions in throwing out a man’s conviction for enticing someone he believed was a 13-year-old girl into sex.

And when she threw out a life prison term for a convicted heroin dealer, ordering that he be resentenced, Sotomayor wrote that judges should not show “slavish adherence” to the “literal terms” of then-mandatory sentencing guidelines when their language is flawed. The view echoed her criticism of the guidelines from the bench that became an issue in her 1997 confirmation hearings.

At those hearings, Republicans criticized Sotomayor for apologizing to a defendant for a mandatory minimum sentence she imposed and for calling the sentence an “abomination.” She told senators that the apology expressed her frustration over a feature in the sentencing rules that Congress later changed, conceded she should not have used the word “abomination” and expressed general support for the guidelines.

Other cases displayed Sotomayor’s support for First Amendment protections, campaign finance reforms challenged by conservatives and privacy rights. She ruled against corporations in six of eight business cases.

Although her decisions are filled with citations of the law and precedent, Sotomayor once pointed to “powerful policy considerations” in allowing a lawsuit against Visa and MasterCard to go forward, and she worried about damage to U.S.-British relations in arguing that British subjects should have access to U.S. courts. Conservatives have criticized Sotomayor for saying in 2005 that “the Court of Appeals is where policy is made. I know this is on tape,
and I should never say that.” The White House has defended her, saying the remark was taken out of context.

Sotomayor, appointed to the appeals court by President Bill Clinton, is a former assistant district attorney in Manhattan and a trial judge, and acquaintances say that background has helped shape her judicial style. She overturns lower courts at roughly the same rate as other Democratic appointees. Her writings are full of details from the trial record, especially in criminal matters, where she often meticulously analyzes witness testimony.

When she reinstated a verdict against Ford Motor Co. in 2002 in the lawsuit of a woman who said her van suddenly accelerated without her touching the gas pedal, Sotomayor wrote that one witness’s testimony “requires two simultaneous malfunctions in the cruise control circuitry. The first is an open ground connection to the speed amplifier, resulting from a loose or broken wire.”

Last year, in voting to overturn a firearms defendant’s sentence, Sotomayor joined a Democratic appointee and a Republican in analyzing whether New York City’s dense population puts bystanders at greater risk from gunfire than those elsewhere. She wrote a separate dissent, acknowledging that the trial judge’s opinion on the subject was “detailed” but citing government reports and newspaper articles to argue it was “insufficient” to support a sentence above the range recommended by federal guidelines.

A Republican appointee who disagreed wrote that “appellate courts are not factfinders. . . . I do not understand it to be our role . . . to engage in this kind of dissection of the empirical evidence cited by the district court. Nor is it to identify competing studies or news articles pointing in other directions.”

In 2004, Sotomayor appeared to go beyond the facts established at trial in arguing that two teenage girls were illegally strip-searched at Connecticut juvenile detention facilities. Their lawsuit against the state was dismissed by a federal judge but reinstated in an opinion written by a Democratic 2nd Circuit appointee, who said four of the strip searches at issue were unlawful but four others were legal.

Sotomayor dissented, arguing that all were illegal and blasting any strip search as “severely intrusive.” Citing documents from pretrial discovery, she broke down all 34 strip searches at the facilities in which contraband was found on a prisoner from 1995 to 2000—searches that were not part of the lawsuit. She concluded that there was “absolutely no evidence that suspicionless strip searches were necessary.”

(The Supreme Court last month voiced skepticism of strip-searching teenage girls, ruling 8 to 1 that Arizona school officials violated the constitutional rights of a 13-year-old girl when they strip-searched her on suspicion that she might be hiding ibuprofen in her underwear.)

Hellman, the law professor, called Sotomayor’s approach “a kind of carpet-bombing, a relentless mustering of facts. She goes well beyond what is necessary for the case and is determined not to just defeat the other side, but to annihilate it.”

Sotomayor’s style is consistent even when she finds against defendants, such as when she affirmed the conviction of a child pornography defendant in 2004. A U.S. district court judge had concluded after an
evidentiary hearing that the man was innocent but denied his petition because it was filed too late.

Even though she had decided the core issue—the conviction—Sotomayor broke down the witnesses and testimony at the judge’s hearing. She concluded his finding of innocence was “clearly erroneous,” even as she said that district courts “are generally best placed to evaluate testimony in light of the witnesses’ demeanor.”

A fellow Democratic appointee, Judge Rosemary S. Pooler, dissented. Sotomayor’s opinion, she wrote, was based on “speculations and conjectures” and disregarded the judge’s “role as the finder-of-facts.”

“It is inappropriate in all but the most extraordinary cases for this Court to second-guess a district court’s credibility findings,” Pooler concluded. “The majority’s dissection of the district court’s decision departs from our precedents and wrongly supplants the lower court’s assessment of the evidence with its own factual inferences, never having seen or heard any of the testimony that it now seeks to discredit.”
"Queries on Abortion and Guns Fail to Break Judge’s Stride"

The New York Times
July 16, 2009
Sheryl Gay Stolberg and Neil A. Lewis

Republicans turned to the politically fraught issues of abortion and gun rights on Wednesday in an effort to knock Judge Sonia Sotomayor off stride, but as she neared the end of her testimony, her composure remained intact and her confirmation to the Supreme Court seemed on track.

Publicly, Republicans on the Senate Judiciary Committee said they had not yet made up their minds about how to vote; several used the word “muddled” to describe Judge Sotomayor’s answers. But the Republicans also seemed to be conceding that they had not built the momentum necessary to derail the nomination.

One of the committee’s most senior members, Senator Orrin G. Hatch, Republican of Utah, said in an interview that he would be surprised if some in his party did not vote to confirm.

Though Mr. Hatch said he had not made up his mind, he could be a barometer for other Republicans. He has voted in the past to confirm Democratic nominees to the Supreme Court and said even before Judge Sotomayor was nominated that she would be difficult to oppose.

“Has she handled all the questions well? No,” he said. “But she’s handled a lot of the questions probably well enough.”

Democrats said they were confident that the nominee would survive the committee process without any major gaffes, and hoped she would wrap up her testimony Thursday morning. The Democratic leadership is planning on a full Senate vote in early August, in keeping with President Obama’s request to have Judge Sotomayor seated well before the court’s new term begins.

After spending Tuesday either retreating from or trying to explain away some of her speeches, notably the one in which she said a “wise Latina woman” might reach a better conclusion than a white male who had not had the same experiences, the judge spent Wednesday fending off Republicans’ efforts to pin down her views on abortion and gun ownership. In pursuing this line of questioning, Republicans were addressing issues of particular concern to their party’s conservative base.

Judge Sotomayor said Mr. Obama had never asked for her views on abortion. She said she had “no idea” why one of her colleagues had told a reporter that she would be predisposed to supporting abortion rights, especially since she once ruled to uphold the “Mexico City policy,” which barred taxpayer dollars from going to overseas clinics that provide abortion services.

Some of her sharpest exchanges came with Senator Tom Coburn, Republican of Oklahoma, a family practice doctor who is one of the Senate’s staunchest abortion foes.

Mr. Coburn pressed her on whether it would be legal for a woman 38 weeks pregnant to abort a fetus found to have the developmental birth defect spina bifida.

“I can’t answer that in the abstract,” Judge
Sotomayor said.

But the mood in the hearing room was generally lighter than on Tuesday, perhaps reflecting Judge Sotomayor's own sense that the pressure was off. Perry Mason, the television lawyer who inspired her as a child, was a recurring topic of discussion.

And in one comical if awkward exchange with Mr. Coburn, on whether Americans had a right to self-defense, Judge Sotomayor broke with her resistance to hypotheticals to invoke one, imagining an instance in which, threatened with imminent harm, she went home, got a gun and came back to shoot him.

"You'd have lots of 'splaining to do," Mr. Coburn replied, borrowing Desi Arnaz's frequent line in his portrayal of Ricky Ricardo, the Cuban-American bandleader on the old "I Love Lucy" television show.

The gun-rights issue that Republicans raised is straightforward on its face but involves complex and esoteric legal arguments: Does the Supreme Court's ruling that the Second Amendment provides an individual right to possess firearms apply to the states as it does to the federal government?

In a New York case involving a martial-arts weapon, Judge Sotomayor joined in an opinion that found it did not, a conclusion that has been criticized by gun-rights advocates. The Supreme Court will soon address the question, and Judge Sotomayor steered clear of it on Wednesday.

Politically, the issue is a consequential one for Republicans, as well as for some moderate Democrats. Gun owners are a core constituency for some senators, and the National Rifle Association has expressed great reservations about Judge Sotomayor.

The N.R.A. has not yet decided whether to publish a scorecard of how senators vote on the nomination, but if it does, a vote in favor could have political implications for Republicans and moderate Democrats seeking re-election.

Many Republicans still have bitter memories of Mr. Obama's decision, as senator, to vote against confirmation of Judge John G. Roberts Jr. for chief justice. While Mr. Obama agreed that Judge Roberts was qualified, he said at the time that the "critical ingredient is supplied by what is in the judge's heart."

One question is whether Republicans will apply that same standard to Judge Sotomayor. On Wednesday, at least one, Senator Lindsey Graham of South Carolina, seemed to suggest that he would not.

"The president has earned the right to pick somebody different than I would pick, and the balance of power in the court is not going to change dramatically if she gets on the court," Mr. Graham told reporters, although he said he remained "uncomfortable" with Judge Sotomayor's views and had not decided how to vote.

For a second day on Wednesday, Republicans sought to draw a contrast between Judge Sotomayor's impassioned speeches—Mr. Graham called them "edgy"—and her legal rulings, which have hewed closely to precedent. Senator John Cornyn, Republican of Texas, urged the nominee to "try to help us reconcile the two pictures" of her, adding, "You will be free as a United States Supreme Court justice to basically do what you want."

Senator Arlen Specter of Pennsylvania, who became a Democrat this spring after decades
as a Republican and who has questioned Supreme Court nominees since 1981, remained dogged in interrogation. Mr. Specter used the hearing as a vehicle to speak directly to the Supreme Court about his view that the justices should allow their sessions to be televised, and that they should agree to hear more cases.

Once Judge Sotomayor wraps up her testimony, the committee will move on to other witnesses. They include Frank Ricci, the New Haven firefighter on the winning side of a Supreme Court race-discrimination ruling that overturned an appellate court decision in which Judge Sotomayor participated.

Mr. Ricci and 11 other New Haven firefighters, all in crisp blue uniforms, were present for Wednesday’s proceedings as guests of Senator Jeff Sessions of Alabama, the committee’s senior Republican.
Two months ago, Sonia Sotomayor’s Latino heritage was viewed as an overwhelming asset. And though history will be made if she becomes the Supreme Court’s newest justice, there wasn’t much talk about that during three days of grueling testimony last week. For some, her confirmation hearings left a bitter taste.

“This is a great first, but we are not being allowed to celebrate it in the way we are allowed to celebrate Thurgood Marshall as the first African American on the court,” said Laura Gomez, a University of New Mexico law professor.

That’s because Republicans on the Senate Judiciary Committee attempted to shine a negative light on Sotomayor’s earlier statements about what she as a Latina could bring to judging and on her connections with a Latino advocacy group. In wave after wave of questions, they suggested that statements by the New York federal appellate judge indicated an inability to remain impartial on the bench.

Sotomayor had given them ammunition: speeches in which she said she hoped that “a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male.”

By the end of the week, however, she had forcefully rejected that notion—along with the idea that her diverse background meant she would judge with “empathy,” a quality President Obama had said was important for a high-court justice.

She also denied being involved in abortion-rights lawsuits filed by the Puerto Rican advocacy group whose board she served on for 12 years.

Even though Sotomayor is almost certain to be confirmed, some Republicans considered their bid to root out what they saw as potential prejudices as a kind of victory.

“We had a more honest discussion of some of the complexities and sensitivities of the race question in this hearing than in the 12 years I have been in the Senate,” said Sen. Jeff Sessions of Alabama, the ranking Republican on the committee, whose own bid for a federal judgeship was blocked because of racially insensitive remarks he had made in the past.

Sotomayor’s supporters, however, viewed the questioning another way.

“It was extremely disappointing and a walk backward from the point of diversity,” said Sherrilyn Ifill, a law professor at the University of Maryland. “This was not a productive conversation. It was unfortunate posturing by the Republicans.

“This was an all-white judiciary committee asking condescending questions. And it was an unequal power situation. She was not in a position to honestly engage with them, because she needed their votes.”

What last week’s public exercise illustrated was the nature of questions of race and identity in America: Ethnic pride to some is
identity politics to others.

At the heart of the Republican questioning was a sense of mistrust that they said was based on a notable difference between the probity of Sotomayor's decisions as a judge and the more liberal tone of her speeches. Some senators were convinced she was masking her true nature—and that it would be revealed once she was given a lifetime post on the Supreme Court.

To put a human face on their concerns, they invited a white firefighter and a Latino firefighter from Connecticut to testify on Sotomayor's ruling in their discrimination case, Ricci vs. DeStefano.

"I think we all want a justice who is neutral and impartial," said Jenny Rivera, a law professor at the City University of New York, who once clerked for Sotomayor. But Republicans, she said, maintained that "when you put on the robes, you put on the shelf your sense of history and identity and heritage."

Conservatives, however, said that the GOP senators had succeeded in forcing Sotomayor to distance herself from her earlier statements about ethnicity and gender swaying her decisions.

"It seems conservatives are winning the larger war over the judiciary, even if losing the battle over this nomination," Jonathan Adler, a law professor at Case Western Reserve University in Cleveland, wrote in the Washington Post.

Sotomayor "ended up disavowing many of her previous statements or trying to reinterpret them," said Ilya Somin of George Mason University School of Law.

"More significantly, she ended up publicly rejecting the president's view that empathy should often guide judicial decision-making," he said.

Democrats on the judiciary committee seemed to go out of their way to avoid the issue of Sotomayor's heritage, focusing instead on her 17-year judicial record, one that even some Republicans conceded contained little to fight about.

And Sotomayor herself was forced to step lightly around the subject, disavowing her "wise Latina" comment as a "rhetorical riff" that had the opposite meaning than she had intended.

"Her selection by the nation's first black president is a testament to the advances in diversity and tolerance that we have made as a nation," said Rachel Moran, a law professor at UC Irvine.

But, Moran noted, Sotomayor "made no explicit reference to her personal story as the daughter of Puerto Rican parents who moved to New York. Instead, she described her life as 'uniquely American.'"

Several GOP senators cast their line of questioning in terms of achieving a goal laid out by Chief Justice John G. Roberts Jr., who has said: "The best way to stop discriminating based on race is to stop discriminating based on race."

Their actions had an effect.

"I think, before the hearings, we were seeing a discussion that diversity can enrich any institution," said Victoria DeFrancesco Soto, a political science professor at Northwestern University. But that talk "became too
radioactive," she said.

The GOP senators “were playing to the angry white male voter. Some of the remarks were clearly about saying that ‘you’ can say things that ‘we’ can’t,” said Julian Zelizer, a professor of history and public affairs at Princeton University.

“These kinds of comments attacking ethnic pride and the benefits of diversity in any institution—which is really what her remark was about—combined with the Ricci case looked like backlash politics, pure and simple.”

Despite the hearings, Sotomayor’s Puerto Rican heritage and Bronx upbringing will have an effect inside the Supreme Court, legal experts said.

“Thurgood Marshall’s presence changed the Supreme Court in profound ways, and I do not doubt that Judge Sotomayor will also have a significant impact on the court,” said John Payton, president of the NAACP Legal Defense Fund.

“She is a powerful personality. She is extremely thoughtful and self-reflective. . . . She will be the second woman, the second nonwhite member and the first Latina. All of these will certainly matter.”
To hear the senators talking, their overwhelming impression of Sonia Sotomayor on this first day of her confirmation hearings is that she is Just. Too. Much.

Sotomayor herself feeds that impression off the bat by confessing to the committee that she has brought along too much family—or what she describes as “familylike” people. If she were to introduce the whole pack of them by name, she says, “We’d be here all morning.” Sen. Patrick Leahy, D-Vt., then tries to turn the judge’s Too Muchness into an asset by trussing up Sotomayor in superlatives. “She has more federal judicial experience than any nominee to the Supreme Court in 100 years.” “She is the first nominee in well over a century to be nominated to three different federal judgeships by three different presidents.”

We hear over and over that to be the first requires being “the best.” Sen. Kirsten Gillibrand, D-N.Y., promises that Sotomayor will go on to be “one of the finest justices in American history.”

Her Republican critics, for their part, also paint the Supreme Court nominee as outsized, forever spilling out of her confines.

In their mouths, of course, this larger-than-life-ness is monstrous. Sen. Jeff Sessions, R-Ala., points out that Sotomayor’s “background, gender, prejudices, or sympathies” could sway her decisions. Sen. John Kyl, R-Ariz., warns that the judge’s statements “suggest that she may allow, and even embrace, decision-making based on her biases and prejudices.” Sen. Chuck Grassley, R-Iowa, quotes a speech in which she argued that “it’s a disservice both to the law and society for judges to disregard personal views shaped by one’s differences as women or men of color.”

If the whole theme of the John Roberts and Samuel Alito hearings was that Democrats worried these men were seriously lacking something (heart, soul, humanity), the whole Republican attack on Sotomayor turns on the opposite kind of accusation. They make her froth, teem, and bubble over with excess gender and race identification, such that prejudice and bias will inevitably follow.

Sen. Lindsey Graham goes out of his way to frame his critique in terms of Sotomayor straying even beyond the bounds of her temperate judicial record. “It bothers me when someone wearing the robe takes the robe off and says experience makes them better than anyone else,” he says, referring to Sotomayor’s much-invoked comments about the virtues of being a wise Latina. If you think about it, the judiciary committee is playing out a meta version of the fight that happens every day at the court. Republicans typically say they want their judges humble, restrained, and able to fit comfortably in the overhead bin. Democrats want their judges to be the stuff of legends; hence all the references today to Thurgood Marshall and Oliver Wendell Holmes. Sonia Sotomayor’s task is to stake out a space for herself somewhere in between.

The senators also use their time to show that they have a cold, mathematical formula for
why this nominee may not be cold and mathematical enough to judge. They lay out their respective neutrality tests. Jeff Sessions tells us that he will not vote up or down on the nomination solely based on Sotomayor’s record, because it does not tell us what will happen when “the judge’s philosophy will be allowed to reach full bloom.” Orrin Hatch, R-Utah, describes a test for judicial fitness that’s so scientific it was published in the Harvard Journal of Law and Public Policy. Sen. Grassley says he will be “asking about your ability to wear that judicial blindfold.”

It would be far more honest, if politically ruinous, for all the senators to do precisely what Judge Sotomayor has done and jettison the calculus to admit that it’s very difficult to separate one’s personal politics from ideology. She said, in her famous 2001 Berkeley speech: “I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.” Sen. Russ Feingold, D-Wis., commends this speech today as a “remarkably thoughtful attempt to grapple with a difficult issue not often discussed by judges: How do a judge’s personal background and experiences affect her judging?” But nobody else wants to hear this judge grapple with her preconceived ideas, even if she is pledging to rise above them.

I am reminded today, as Sotomayor is serially assaulted for her alleged bias, that the last time I covered a judicial confirmation hearing, I was in a daily, miserable personal panic. I had a new baby and every 10-minute break became a frantic search for 12 ounces of fruit juice and a place in the U.S. Senate to plug in a breast pump. I don’t think I’m biased in favor of the average breastfeeding news correspondent. It’s just that a Wise Lactating Woman might just have some thoughts about structuring the breaks in the daily confirmation schedule that don’t always occur to even the wisest men. Sen. Amy Klobuchar, D-Minn., makes this point today when she ticks off the backgrounds of her colleagues on the committee, arguing that nobody is biased. They just have different backgrounds. And when Ruth Bader changed her colleagues’ minds in a strip-search case, she wasn’t infecting them with her bias. She was just explaining something new.

Here’s my own test: Empathy—the judicial attribute that the president has invoked and his opponents have derided as bias—means knowing what you don’t know and being willing to listen to things that never occurred to you. That’s why the only really important part of Judge Sotomayor’s brief opening statement today is her explanation that when she writes opinions, she lays out the law and then explains why on behalf of the court she either accepts or rejects the contrary position. It’s her way of saying she listens to both sides. Maybe all that extrajudicial empathizing makes her too large for the overhead bins. But I think she’s talking about the same “open mind” Justice Alito touted at his hearings—and that’s why that statue of blind justice has two scales instead of an electronic step-on scale that talks out loud.

I confess that despite the fact that it lacked anything memorable, beyond the emotion, I wasn’t disappointed by Judge Sotomayor’s terse, bare-bones opening statement today—a statement in which she did little more than lay out her autobiography and pledge “fidelity to the law.” Yes, it was dispassionate. That’s probably a good thing when your opponents believe you’re too excitable. Yes, it was spare. That’s a good thing when your critics celebrate
minimalism and humility above all things. Given how often Sotomayor was accused of being hugely, inappropriately larger-than-life today, going tiny may have been precisely the right way for her to play it.
WASHINGTON—In 2001, Sonia Sotomayor, an appeals court judge, gave a speech declaring that the ethnicity and sex of a judge “may and will make a difference in our judging.”

In her speech, Judge Sotomayor questioned the famous notion—often invoked by Justice Ruth Bader Ginsburg and her retired Supreme Court colleague, Sandra Day O’Connor—that a wise old man and a wise old woman would reach the same conclusion when deciding cases.

“I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life,” said Judge Sotomayor, who is now considered to be near the top of President Obama’s list of potential Supreme Court nominees.

Her remarks, at the annual Judge Mario G. Olmos Law and Cultural Diversity Lecture at the University of California, Berkeley, were not the only instance in which she has publicly described her view of judging in terms that could provoke sharp questioning in a confirmation hearing.

This month, for example, a video surfaced of Judge Sotomayor asserting in 2005 that a “court of appeals is where policy is made.” She then immediately adds: “And I know—I know this is on tape, and I should never say that because we don’t make law. I know. OK. I know. I’m not promoting it. I’m not advocating it. I’m—you know.”

The video was of a panel discussion for law students interested in becoming clerks, and she was explaining the different experiences gained when working at district courts and appeals courts. Her remarks caught the eye of conservative bloggers who accused her of being a “judicial activist,” although Jonathan H. Adler, a professor at Case Western Reserve University law school, argued that critics were reading far too much into those remarks.

Republicans have signaled that they intend to put the eventual nominee under a microscope, and they say they were put on guard by Mr. Obama’s statement that judges should have “empathy,” a word they suggest could be code for injecting liberal ideology into the law.

Judge Sotomayor has given several speeches about the importance of diversity. But her 2001 remarks at Berkeley, which were published by the Berkeley La Raza Law Journal, went further, asserting that judges’ identities will affect legal outcomes.

“Whether born from experience or inherent physiological or cultural differences,” she said, for jurists who are women and nonwhite, “our gender and national origins may and will make a difference in our judging.”

Her remarks came in the context of reflecting her own life experiences as a Hispanic female judge and on how the increasing diversity on the federal bench “will have an effect on the development of
the law and on judging.”

In making her argument, Judge Sotomayor sounded many cautionary notes. She said there was no uniform perspective that all women or members of a minority group have, and emphasized that she was not talking about any individual case.

She also noted that the Supreme Court was uniformly white and male when it delivered historic rulings against racial and sexual discrimination. And she said she tried to question her own “opinions, sympathies and prejudices,” and aspired to impartiality.

Still, Judge Sotomayor questioned whether achieving impartiality “is possible in all, or even, in most, cases.” She added, “And I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society.”

She also approvingly quoted several law professors who said that “to judge is an exercise of power” and that “there is no objective stance but only a series of perspectives.”

“Personal experiences affect the facts that judges choose to see,” she said.
"I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion [as a judge] than a white male who hasn't lived that life."—Judge Sonia Sotomayor, in her Judge Mario G. Olmos Law and Cultural Diversity Lecture at the University of California (Berkeley) School of Law in 2001

The above assertion and the rest of a remarkable speech to a Hispanic group by Sotomayor—widely touted as a possible Obama nominee to the Supreme Court—has drawn very little attention in the mainstream media since it was quoted deep inside The New York Times on May 15.

It deserves more scrutiny, because apart from Sotomayor’s Supreme Court prospects, her thinking is representative of the Democratic Party’s powerful identity-politics wing.

Sotomayor also referred to the cardinal duty of judges to be impartial as a mere "aspiration because it denies the fact that we are by our experiences making different choices than others." And she suggested that "inherent physiological or cultural differences" may help explain why "our gender and national origins may and will make a difference in our judging."

So accustomed have we become to identity politics that it barely causes a ripple when a highly touted Supreme Court candidate, who sits on the federal Appeals Court in New York, has seriously suggested that Latina women like her make better judges than white males.

Indeed, unless Sotomayor believes that Latina women also make better judges than Latino men, and also better than African-American men and women, her basic proposition seems to be that white males (with some exceptions, she noted) are inferior to all other groups in the qualities that make for a good jurist.

Any prominent white male would be instantly and properly banished from polite society as a racist and a sexist for making an analogous claim of ethnic and gender superiority or inferiority.

Imagine the reaction if someone had unearthed in 2005 a speech in which then-Judge Samuel Alito had asserted, for example: "I would hope that a white male with the richness of his traditional American values would reach a better conclusion than a Latina woman who hasn't lived that life"—and had proceeded to speak of "inherent physiological or cultural differences."

I have been hoping that despite our deep divisions, President Obama would coax his party, and the country, to think of Americans more as united by allegiance to democratic ideals and the rule of law and less as competing ethnic and racial groups driven by grievances that are rooted more in our troubled history than in today’s reality.

I also hope that Obama will use this Supreme Court appointment to reinforce the message of his 2004 Democratic convention speech: “There’s not a black America, and
white America, and Latino America, and Asian America; there’s the United States of America.”

But in this regard, the president’s emphasis on selective “empathy” for preferred racial and other groups as “the criteria by which I’ll be selecting my judges” is not encouraging, as I explained in a May 15 post on National Journal’s The Ninth Justice blog.

As for Sotomayor’s speech, fragmentary quotations admittedly cannot capture every qualification and nuance. She also stressed that although “men lawyers . . . need to work on” their “attitudes,” many have already reached “great moments of enlightenment.” She noted that she tries to be impartial. And she did not overtly suggest that judges should play identity politics.

I place the earlier quotations in more-detailed context here so that readers can assess Sotomayor’s meaning for themselves.

“Judge [Miriam] Cedarbaum [of the federal District Court in New York] . . . believes that judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law. Although I agree with and attempt to work toward Judge Cedarbaum’s aspiration, I wonder whether achieving that goal is possible in all or even in most cases. And I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society. Whatever the reasons . . . we may have different perspectives, either as some theorists suggest because of our cultural experiences or as others postulate because we have basic differences in logic and reasoning. . . .

“Our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that—it’s an aspiration because it denies the fact that we are by our experiences making different choices than others. . . .

“Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice [Sandra Day] O’Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. . . . I am . . . not so sure that I agree with the statement. First . . . there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”

The full text of the speech, as published in the Berkeley La Raza Law Journal in 2002, is available on The New York Times website. (It says that the speech was in 2002; I’ve read elsewhere that it was October 2001.)

To some extent, Sotomayor’s point was an unexceptionable description of the fact that no matter how judges try to be impartial, their decisions are shaped in part by their personal backgrounds and values, especially when the law is unclear. As she detailed, for example, some studies suggest that female judges tend to have different voting patterns than males on issues including sex discrimination.

I also share Sotomayor’s view that presidents should seek more ethnic and gender diversity on the bench, so that
members of historically excluded groups can see people like themselves in important positions and because collegial bodies tend to act more wisely when informed by a diversity of experiences.

It follows that the Supreme Court might well be a wiser body—other things being equal—if the next justice is a Hispanic woman of outstanding judgment and capability. But do we want a new justice who comes close to stereotyping white males as (on average) inferior beings? And who seems to speak with more passion about her ethnicity and gender than about the ideal of impartiality?

Compare Sotomayor’s celebration of “how wonderful and magical it is to have a Latina soul” and reflections “on being a Latina voice on the bench” with Judge Learned Hand’s eulogy for Justice Benjamin Cardozo in 1938.

“The wise man is the detached man,” Hand wrote. “Our convictions, our outlook, the whole makeup of our thinking, which we cannot help bringing to the decision of every question, is the creature of our past; and into our past have been woven all sorts of frustrated ambitions with their envies, and of hopes of preferment with their corruptions, which, long since forgotten, determine our conclusions. A wise man is one exempt from the handicap of such a past; he is a runner stripped for the race; he can weigh the conflicting factors of his problem without always finding himself in one scale or the other.”

Some see such talk as tiresome dead-white-male stuff, from a time when almost all judges were white males—although, in Cardozo’s case, descended from Portuguese Jews. I see it as the essence of what judges should strive to be.

I do not claim that the very different worldview displayed in Sotomayor’s speech infuses her hundreds of judicial opinions and votes rendered over more than a decade on the Appeals Court. But only a few of her cases have involved the kind of politically incendiary issues that make the Supreme Court a storm center.

In one of her few explosive cases, Sotomayor voted (without writing an opinion) to join two colleagues in upholding what I see as raw racial discrimination by New Haven, Conn. The city denied promotions to the firefighters who did best on a test of job-related skills because none was black....

The Supreme Court is widely expected to reverse that decision in June. And even if a devotee of identity politics fills retiring Justice David Souter’s seat, she will not have enough votes to encourage greater use of such racial preferences. Not yet.
Long past the Civil War, and a generation after the formative civil rights struggle, many of us remain incapable of having a conversation about ethnicity that does not devolve into charges of racism.

One recent example of this is the public discussion about the nomination of Judge Sonia Sotomayor to the Supreme Court, and the widespread accusations that she has been unable to dispassionately decide cases involving questions of race. In the rush to find Judge Sotomayor’s “biases,” critics have latched onto her decision in *Ricci v. DeStefano*, where she ruled in favor of New Haven’s decision to discard the results of a promotion exam for firefighters because too few minorities scored high enough. Some infer from this that Judge Sotomayor must be biased against whites.

Overlooked in the hysteria over this one decision is that Judge Sotomayor considered issues of race almost 100 times as an appellate judge. Having now reviewed every single race-related case on which she sat in more than a decade on the United States Court of Appeals for the Second Circuit, I’ve concluded that Judge Sotomayor does not allow bias to infect her decision-making.

In addition to *Ricci v. DeStefano*, Judge Sotomayor has participated in 97 race-related cases. Of these, the court of appeals rejected the claim of discrimination roughly 80 times and agreed with it 10 times. (The remaining cases involved other kinds of claims or dispositions.) In the 10 cases in which the court of appeals favored claims of discrimination, nine resulted in unanimous rulings and seven involved at least one Republican-appointed judge. In the single time a judge dissented from a ruling in which Judge Sotomayor participated, the dissent was over a technical question, not race discrimination.

In total, Judge Sotomayor has disagreed with her colleagues in race-related decisions—a fair measure of whether she is an outlier—only five times in 11 years. In that entire time, Judge Sotomayor has only twice dissented from a ruling on a substantive question of race discrimination.

In her opinions regarding civil rights laws, Judge Sotomayor has written about principles of restraint. She has stressed that “the duty of a judge is to follow the law,” so that judges have no power “to disregard the plain language of any statute or to invent exceptions to the statutes” created by Congress.

That principle seems to run consistently through her rulings on race-related cases. Dissenting from a decision to permit the New York Police Department to fire an employee for sending hate mail, she wrote, “To be sure, I find the speech in this case patently offensive, hateful and insulting.” But, she added, “While we are more comfortable when the speech we are protecting involves protestations against racial discrimination, it is not our role to approve or disapprove of the viewpoint advanced.”

In rejecting the discrimination claims of black passengers against an airline based on
an international treaty limiting suits against carriers, she rejected the plaintiffs’ assertion that “we should nonetheless carve out an exception for civil rights actions as a matter of policy” in light of “the specter that our decision will open the doors to blatant discrimination aboard international flights.”

That is not to say that Judge Sotomayor is inattentive to questions of racial discrimination. In *Gant v. Wallingford Board of Education*, for example, she dissented from the majority’s ruling that a school’s favorable treatment of white students could not prove that a young black student who was demoted to a lower grade was the victim of discrimination. In *Hayden v. Pataki*, she concluded that felon disenfranchisement laws are discriminatory and violate the Voting Rights Act.

Her decisions in these cases would hardly make her an extremist.

The now notorious *Ricci v. DeStefano* was a genuinely tough call. Yes, the firefighter plaintiffs had a serious claim that they suffered discrimination when the city refused to apply a promotion test they passed. But the city argued that it feared a lawsuit by minority firefighters alleging that the city’s promotion tests unintentionally discriminated against blacks and Hispanics. A ruling in the city’s favor was not necessarily ideological.

The public debate ought to be about what the law should command in these kinds of difficult cases. Unsubstantiated charges of racism distract us from these questions and demean our justice system.
"The Sotomayor Nomination"

Forbes
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Richard A. Epstein

In a previous Forbes column, I decried President Barack Obama's insistence that empathy would weigh heavily in the scales when it came to his next Supreme Court nominee. And reading the arguments that were put forth to justify the nomination of Sonia Sotomayor of the Second Circuit to the Supreme Court, it appears that all the bad chickens have come home to roost.

Evidently, the characteristics that matter most for a potential nominee to the Supreme Court have little to do with judicial ability or temperament, or even so ephemeral a consideration as a knowledge of the law. Instead, the tag line for this appointment says it all. The president wants to choose “a daughter of Puerto Rican parents raised in Bronx public housing projects to become the nation’s first Hispanic justice.”

Obviously, none of these factors disqualifies anyone for the Supreme Court. But affirmative-action standards are a bad way to pick one of the nine most influential jurists in the U.S., whose vast powers can shape virtually every aspect of our current lives. In these hard economic times, one worrisome feature about the Sotomayor nomination is that the justices of the Supreme Court are likely to have to pass on some of the high-handed Obama administration tactics on a wide range of issues that concern the fortunes of American business.

We have already seen a president whose professed devotion to the law takes a backseat to all sorts of other considerations. The treatment of the compensation packages of key AIG executives (which eventually led to the indecorous resignation of Edward Liddy) and the massive insinuation of the executive branch into the (current) Chrysler and (looming) General Motors bankruptcies are sure to generate many a spirited struggle over two issues that are likely to define our future Supreme Court’s jurisprudence: the level of property-rights protection against government intervention on the one hand, and the permissible scope of unilateral action by the president in a system that is (or at least should be) characterized by a system of separation of powers and checks and balances on the other.

Here is one straw in the wind that does not bode well for a Sotomayor appointment. Justice Stevens of the current court came in for a fair share of criticism (all justified in my view) for his expansive reading in *Kelo v. City of New London* (2005) of the “public use language.” Of course, the takings clause of the Fifth Amendment is as complex as it is short: “Nor shall private property be taken for public use, without just compensation.” But he was surely done one better in the Summary Order in *Didden v. Village of Port Chester*, issued by the Second Circuit in 2006. Judge Sotomayor was on the panel that issued the unsigned opinion—one that makes Justice Stevens look like a paradigmatic defender of strong property rights.

I have written about *Didden* in Forbes. The case involved about as naked an abuse of government power as could be imagined. Bart Didden came up with an idea to build a pharmacy on land he owned in a
redevelopment district in Port Chester over which the town of Port Chester had given Greg Wasser control. Wasser told Didden that he would approve the project only if Didden paid him $800,000 or gave him a partnership interest. The “or else” was that the land would be promptly condemned by the village, and Wasser would put up a pharmacy himself. Just that came to pass. But the Second Circuit panel on which Sotomayor sat did not raise an eyebrow. Its entire analysis reads as follows: “We agree with the district court that [Wasser’s] voluntary attempt to resolve appellants’ demands was neither an unconstitutional exaction in the form of extortion nor an equal protection violation.”

Maybe I am missing something, but American business should shudder in its boots if Judge Sotomayor takes this attitude to the Supreme Court. Justice Stevens wrote that the public deliberations over a comprehensive land use plan is what saved the condemnation of Ms. Kelo’s home from constitutional attack. Just that element was missing in the Village of Port Chester fiasco. Indeed, the threats that Wasser made look all too much like the “or else” diplomacy of the Obama administration in business matters.

Jurisprudentially, moreover, the sorry Didden episode reveals an important lesson about constitutional law. It is always possible to top one bad decision (Kelo) with another (Didden). This does not augur well for a Sotomayor appointment to the Supreme Court. The president should have done better, and the Senate, Democrats and Republicans alike, should subject this dubious nomination to the intense scrutiny that it deserves.
Elections have consequences: President Obama’s first nominee to the Supreme Court, Judge Sonia Sotomayor, will likely be confirmed.

But supporters of liberal judicial philosophy might find it a Pyrrhic victory. During three days of careful questioning, Judge Sotomayor renounced the pillars of activist thinking.

She rejected the president’s “empathy standard,” abandoned her statements that a judge’s “opinions, sympathies and prejudices” may guide decision-making, dismissed remarks that personal experiences should “affect the facts that judges choose to see,” brushed aside her repeated “wise Latina” comment as “a rhetorical flourish,” and championed judicial restraint.

Judge Sotomayor’s attempt to rebrand her previously stated judicial approach was, as one editorial page opined, “uncomfortably close to disingenuous.”

Why not defend the philosophy she had articulated so carefully over the years?

Because the American people overwhelmingly reject the notion that unelected judges should set policy or allow their social, moral, or political views to influence the outcome of cases. Rather, the public wants and expects restrained courts, tethered to the Constitution, and judges who impartially apply the law to the facts.

In the end, her testimony served as a repudiation of judicial activism.

But pledging “fidelity to the law” and practicing judicial restraint are different things. Which Sotomayor will we get?

At the hearings, which were praised for their substance and respectful tone, we looked closely at the record:

—Her 2006 private property decision permitted the government to take property from one developer and give it to another.

—Her 2008 Ricci decision allowed a city to discriminate against one group of firefighters because of their race. That ruling was recently reversed by the Supreme Court.

—Her 2009 Second Amendment decision would give states the power to ban firearms. These rulings have three things in common. Each was contrary to the Constitution. Each was decided in a brief opinion, short on analysis. And each was consistent with liberal political thought.

I don’t believe that Judge Sotomayor has the deep-rooted convictions necessary to resist the siren call of judicial activism. She has evoked its mantra too often. As someone who cares deeply about our great heritage of law, I must withhold my consent.
As Judge Sonia Sotomayor’s confirmation hearing began last week, many commentators predicted that she would portray herself as a moderate judge committed to judicial restraint. True to these expectations, Judge Sotomayor described her judicial philosophy as quite simple: “fidelity to the law.” Yet the judge’s history on the Second Circuit—not to mention her earlier speeches—suggest that she believes judges can go beyond the law to make policy decisions. For this reason, a vote to confirm Judge Sotomayor is almost certainly a vote in favor of restricting Second Amendment protections and property rights, upholding racial preferences, and providing unlimited abortion on demand.

During last week’s hearing, several senators sought to determine whether Judge Sotomayor supports the Second Amendment’s right to keep and bear arms. In particular, they asked whether this right should be enforced against state governments. Sen. Russ Feingold (D., Wis.) praised the Supreme Court’s ruling in District of Columbia v. Heller (2008), in which it held that the Second Amendment guarantees an individual’s right to keep and bear arms. Mr. Feingold pressed Judge Sotomayor about her Second Circuit panel decision in Maloney v. Cuomo (2009), where she and her colleagues rejected the argument that the right to keep and bear arms should be enforced against the states, stating that “the Second Amendment applies only to limitations the federal government seeks to impose on this right.” That’s like saying you have the right to free speech in Washington, D.C., but not in Arkansas, Indiana or California.

In response to Mr. Feingold’s inquiry, Judge Sotomayor defended the Second Circuit’s decision in Maloney. She refused to acknowledge that her court could have enforced the right to bear arms against the states. Judge Sotomayor’s involvement in this decision does not bode well for a ruling in favor of Second Amendment rights if she is confirmed to the Court.

Judge Sotomayor also revealed a troubling approach to property rights in Didden v. Village of Port Chester (2006). Sitting on another Second Circuit panel, Judge Sotomayor voted to uphold the condemnation of the plaintiffs’ private property despite the obvious corruption surrounding the case. The plaintiffs only faced condemnation because they refused to pay off a politically connected developer. When they refused to pay, the city then condemned the land, declaring it for “public use.”

The court’s decision in Didden weakened protections for property owners even further than the Supreme Court’s decision in Kelo v. City of New London (2005) and indicates that Judge Sotomayor would likely exercise a similar approach on the Supreme Court.

Senators should also be concerned by Judge Sotomayor’s support of racial hiring preferences. In the now famous Ricci v. DeStefano (2009) firefighter case, a Second Circuit panel of judges, including Judge Sotomayor, upheld the city’s decision to disregard the results of a promotion
examination because too few racial minorities passed. On June 29, the Supreme Court overturned the Second Circuit’s ruling, a vote of no-confidence in Judge Sotomayor’s reasoning in Ricci.

In addition, from 1980-92 Judge Sotomayor served on the board of the Puerto Rican Legal Defense and Education Fund, a prominent legal defense and education group organized in part to support unlimited abortion rights. During this period, the fund filed briefs in several prominent abortion cases that expressed unqualified support for a woman’s right to obtain an abortion and opposition to any limits on the Supreme Court’s ruling in Roe v. Wade (1973). Judge Sotomayor’s willingness to play an active role in the fund’s activities is telling.

When you look at Judge Sotomayor’s long, activist legal career, it is hard to square with her new, modest claim of “fidelity to the law.” She herself has said the Supreme Court sets policy. On that standard, Republican and moderate Democratic senators—particularly those in red and purple states—should vote against confirming Judge Sotomayor to the Supreme Court.
President Obama’s choice of Judge Sonia Sotomayor is brilliant politically, but even more importantly, terrific for the Supreme Court and the future of constitutional law. Everything that is known about her indicates that she will be an easy confirmation and an outstanding justice.

From a political perspective, a Supreme Court nomination can be treacherous, as presidents need to please their political base without risking undue political capital over a confirmation fight. Sotomayor’s record shows her to be a moderate liberal who is unlikely to provide fodder for her opponents. Her having been first nominated to the federal bench by a Republican president, George H.W. Bush, will make it harder for Republicans to paint her as an ideologue. Moreover, it is highly unlikely that many Republicans are going to want to strongly oppose the first Latina selected for the high court.

The political reality is that with 59 (and likely soon to be 60) Democratic senators, Sotomayor will surely be confirmed. It doesn’t make political sense for Republicans to fight a losing battle that risks alienating a key and growing political constituency, Hispanic voters.

Sotomayor brings to the bench essential diversity. Every justice’s rulings are a product of his or her life experiences. As a woman, a Latina, a person who has faced a lifelong serious illness (diabetes), and a person who grew up in modest circumstances, Sotomayor brings experiences that are unrepresented or largely absent from the current court. These certainly will influence her rulings and they also may help in the most important task for a Democratic appointee on the current court: persuading Justice Anthony Kennedy, the key swing justice on almost every closely divided issue. Sotomayor’s background, as well as her intellect and experience, make her ideally suited for this role.

President Obama repeatedly has said that he wants a justice who will show empathy. This means a justice who will look at law as it affects people’s lives and not just as an abstract set of rules. Sotomayor is likely to be this justice.

Several decades ago, Justice Thurgood Marshall in a dissenting opinion admonished his colleagues that it is one thing for them to make judgments about the law, but another to make judgments about how poor people live. The court needs people of color and people from disadvantaged backgrounds to offer the chance for empathy that only such experiences can provide.

But most of all, Sotomayor is an excellent choice because she is an outstanding judge. Her opinions are clearly written and invariably well-reasoned. My former students who have clerked for her rave about her as a judge and as a person. She has enormous experience as a lawyer and as a judge, both in the federal district court and the federal court of appeals. The bottom line is that the court will now have its third woman justice in history, its first Latina, and an individual who likely will be an excellent justice for decades to come.
Having argued cases before Judge Sonia Sotomayor on a number of occasions, I have been struck by the assertion by some lawyers that her questioning has been too harsh, even abrasive. True, Judge Sotomayor once described herself in a speech as a “bear on the bench.” And her questions can lead some lawyers to wish they had been quizzed in a far more cuddly manner.

But in my experience her questions are tough and fair, demanding and acute. One could say worse things about a judge.

Consider two of the cases I have argued before her. One arose after a jury had been chosen in federal court to hear accusations that a prominent Wall Street investment banker, Frank Quattrone, had obstructed justice. Days before Mr. Quattrone’s trial commenced in April 2004, a state court judge in another widely publicized case ordered a mistrial after two New York newspapers published the name of (and much critical and personal commentary about) a juror who’d behaved in a manner that led many to think she favored the defendant. Concerned that the same might occur in his court, the federal judge in the Quattrone case entered an order barring the press from publishing the name of any juror.

Well-intentioned as the judge was, his action ran directly into a First Amendment wall. The order was not only a prior restraint on the press, and thus very likely unconstitutional, it also barred publication of juror names already referred to in open court. If anything, this was an even clearer basis for the Second Circuit of Appeals in New York to strike down the lower court’s ruling. Many cases had held that what occurs in a public court is public property, and that the press may not be punished for publishing it.

I pressed the latter point in my oral argument on behalf of a number of press organizations. This was, I said, one of the rare legal rules that were truly absolute.

Judge Sotomayor quickly responded with a series of questions about whether I really meant that the rule was absolute. Yes, I said, I meant it.

What if, she asked, there was some emergency that required a brief halt on publication and to do otherwise would cause grave harm? If the information was already revealed in open court, I said, neither the press nor anyone else could be prevented from revealing it.

Suppose, she said, a hired mob assassin stood up in open court and announced that 20 minutes later a particular person would be killed if the information were made public. Did I really mean that even in that circumstance the courts were without power to act?

Good question. Too good. I paused, concerned that I was wearing out my welcome by taking what increasingly seemed (because of Judge Sotomayor’s questions) a far too extreme position.

I made a last try. If that occurred, I said, you could lock the doors of the courtroom to
keep the press and everyone else from leaving, but you could not enter an order barring them from publishing what they had heard in court.

She looked at me in a bemused way. I looked away and started talking about something else.

We won the case a few weeks later. Judge Sotomayor’s opinion concluded that the order barring publication of the juror names was unconstitutional because it was a prior restraint on speech and because the information had been revealed in open court.

Then she added two elegant lines. “We need not address what exceptional circumstances, if any, could justify a departure from the doctrine barring restrictions on the publication of information revealed in open court. It suffices to hold that the record is devoid of facts that could justify creating such an exception in this case.”

Another encounter was in the 1999 Brooklyn Museum Case, arising out of then-Mayor Rudolph Giuliani’s efforts to strip the museum of all city funding and evict it from its home because it refused to remove a painting the mayor found offensive.

The questions Judge Sotomayor asked the city’s lawyer were the judicial equivalent of hard left jabs in a boxing match. The U.S. Constitution generally bars sanctions against speakers based on their viewpoint. So she asked the lawyer:

“I’m still having difficulty understanding how this is not viewpoint discrimination. Please explain to me what the difference between this and viewpoint discrimination by a state actor. There’s a legion of Supreme Court cases holding that viewpoint discrimination can’t be upheld.”

And then:

“Give me an example of what is impermissible viewpoint discrimination.”

Judge Sotomayor was no easier on me. She pressed me hard on my contention that the museum needed an injunction to protect it against the mayor. She pointed out that if we won the case the museum would get back all the money Mr. Giuliani had withheld. She required me to concede that the museum would suffer no immediate financial hardship if there was no injunction. She asked a series of increasingly difficult questions testing my contention that the case could be in federal court in the first place.

We never had a ruling in the Brooklyn Museum case, since Mr. Giuliani threw in the towel before the court could rule and abandoned his efforts to pressure the museum to remove the painting. But hardball questioning of both sides was precisely what good judges do.

Long before Judge Sotomayor was appointed a federal appellate judge, the single most honored and esteemed member of the U.S. Court of Appeals was Learned Hand. Routinely described as the single greatest American jurist never appointed to the Supreme Court, Hand could terrorize counsel who appeared before him.

When counsel made an argument Hand thought was inadequate, he was notorious for turning his chair around so his back faced the hapless lawyer who was arguing. Hand’s questioning, his biographer wrote, led lawyers “to blanch and shake.”

That’s how a bear in a courtroom behaves.
Every time a new justice comes to the Supreme Court, “it’s a different court,” Justice Byron R. White liked to say—and he was in a position to know, having witnessed the arrival of 13 new justices during his own 31-year tenure.

He meant that in a group of nine people bound together by daily ritual and by the need to round up a sufficient number of like-minded colleagues to get anything done, the substitution of one personality for another matters in real life more than it might seem to matter on paper.

It’s an obvious point, but one that is often overlooked in discussions of Supreme Court nominations when, as now, the departing justice’s successor is one who figures to occupy the same side of the ideological divide.

President Obama’s nominee to succeed Justice David Souter, Judge Sonia Sotomayor, may not vote much differently from Justice Souter, who established a moderately liberal record during his 19 years on the court.

Even before President Obama made his selection, it was commonly said that this particular nomination would not be a “game changer” on today’s sharply polarized court, where two blocs of four justices seem to spend much of their energy competing for the affections of the one in the middle, Anthony M. Kennedy. (In two 5-to-4 decisions issued on Tuesday, Justice Kennedy voted once with the conservative bloc and once with the more liberal bloc; a third decision was unanimous.)

But even when it seems most static, the Supreme Court is a dynamic institution whose component parts are always, although not always visibly, in motion. John G. Roberts Jr. didn’t figure to be a game changer either when President George W. Bush nominated him in 2005 to be chief justice. After all, Chief Justice William H. Rehnquist, who had just died, was his former boss and longtime mentor, and no matter how conservative he might prove to be, it was hard to imagine him or anyone else finding much running room to Rehnquist’s right.

And yet there is a different tone now at the court, and not only because Justice Samuel A. Alito Jr., President Bush’s subsequent nominee, is more conservative than the justice he replaced, Sandra Day O’Connor. John Roberts is a justice in a hurry; he pushes hard, like the young Associate Justice Rehnquist for whom he clerked, and in contrast to Chief Justice Rehnquist, who in his later years was capable of voting in surprising ways—to reaffirm the Miranda decision and reject a constitutional challenge to the Family and Medical Leave Act, for example.

It wasn’t that Chief Justice Rehnquist changed his mind on issues that mattered to him—there is no evidence of that. Rather, he seemed to have developed a sense for when it was best for the court, or perhaps even for the country, not to carry every favored
That is a sense that Chief Justice Roberts did not appear to gain during his first years on the court; his 2007 opinion striking down voluntary school integration plans in Louisville, Ky., and Seattle was so hard-edged that Justice Kennedy refused to sign it, providing a fifth vote for the result but not for the chief justice’s reasoning.

Whether Chief Justice Roberts has developed a Rehnquist-style sense of when to hold back will be evident next month, when the court is expected to decide whether a central provision of the Voting Rights Act, renewed almost unanimously by Congress three years ago, is constitutional. Based on the deep skepticism he expressed when the case was argued last month, the answer is no.

Beyond Sonia Sotomayor’s stirring life story and impressive résumé, what we really want to know is how she will fit into this mix of ideology, personality, principle and politics.

Will she make a difference? According to common sense as well as Justice White’s maxim, the answer is “yes, inevitably.” Will it be a difference that is discernible in the outcomes of cases? That may not be clear immediately.

After Justice Thurgood Marshall retired in 1991, Justice O’Connor published a tribute describing him as the embodiment of “moral truth” and recounting the experience of listening to his stories during the decade that they served together, stories that “would, by and by, perhaps change the way I see the world.” That was a striking statement from a justice who was on the opposite side from Thurgood Marshall in nearly every civil rights case and whose jurisprudence appeared unmarked by his influence. But it turned out to be Justice O’Connor who wrote the majority opinion in 2003 that upheld affirmative action in admission to the University of Michigan Law School. The way she saw the world in the interval had clearly changed, whatever the cause.

Although she is a pioneer in her own way, it takes nothing from Judge Sotomayor to observe that she is not Thurgood Marshall—just as Anthony Kennedy, for that matter, is not Sandra O’Connor.

Indeed, not even the most experienced justice can count on finding an argument that will persuade Justice Kennedy. But there is some evidence that he can be inspired by example and observation. His opinion for the court in Lawrence v. Texas, the 2003 gay-rights case, clearly rested on his conclusion that gays were entitled to the “dignity,” as he put it, that the court’s earlier ruling on gay rights in Bowers v. Hardwick had withheld. That opinion, among others, indicates Justice Kennedy’s willingness to look through the eyes of those whose experiences are different from his own.

In any event, Judge Sotomayor’s nomination comes at a special moment: the first projection of the remarkable 2008 election onto a Supreme Court that has so often in these last few years appeared headed in the opposite direction from the country. Whether her arrival proves to change the way the incumbent justices see the world, it will, at the least, change the way the world sees the Supreme Court.